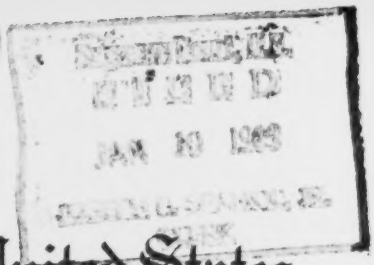
No. 88-1022



In The Supreme Court Of The United States

OCTOBER TERM, 1988

HENRICO COUNTY PUBLIC SCHOOLS, MALCOLM M. CHRISTIAN, WILLIAM C. BOSHER, JR., MORTON BRADMAN, JOANN MARCHANT, PATRICIA MARTIN, GWENDOLYN WHITING, DOROTHY SUGARMAN, and DONALD MAYFIELD,

Defendants/Petitioners,

v.

JONATHAN SPIELBERG, a minor by his parents, Howard and Susan Spielberg, as his next friend; HOWARD SPIELBERG; and SUSAN SPIELBERG,

Plaintiffs/Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF CALLING ATTENTION TO INTERVENING MATTER

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

ADDITIONAL REASONS FOR GRANTING THE WRIT 4

I. The Department Which Administers Virginia's Special Education Program Continues To Interpret Virginia's Regulations Contrary To The Fourth Circuit's Decision. 4

A. The Virginia State Department of Education Recently Reaffirmed That Evaluations Older Than Six Months Must be Updated For Educational Decision-making Despite The District Court's And Fourth Circuit's Disapproval Of That Practice By Henrico. 4

B. The State Department of Education Recently Stated That Reevaluations For Consideration Of A Placement Change Do Not Constitute Predetermination Because Reevaluations Perform The Function Of "Collecting Data" For Decision-making. 8

CONCLUSION 9

CERTIFICATE OF SERVICE

APPENDIX

TABLE OF AUTHORITIES

Case

Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980) 4

Federal Rules

Rule 22.6 of the Rules of the Supreme Court of the United States of America 4

State Administrative Materials

The Process for Special Education Determination in Virginia (Clarification of Issues) (Screening, Assessment/ Eligibility, IEP Development/ Implementation) (April 1986) 1, 6

Letter to Dr. Jo Lynne DeMary, Director of Special Education, Henrico County Public Schools, from Kathe Klare, Supervisor, Due Process Proceedings, Virginia State Department of Education (December 5, 1988) 3, 6, 7

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In The
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HENRICO COUNTY PUBLIC SCHOOLS, MALCOLM M. CHRISTIAN, WILLIAM C. BOSHER, JR., MORTON BRADMAN, JOANN MARCHANT, PATRICIA MARTIN, GWENDOLYN WHITING, DOROTHY SUGARMAN, and DONALD MAYFIELD,

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Plaintiffs/Respondents.

Supplemental Brief Calling Attention To Intervening Matter

REGULATORY PROVISIONS INVOLVED

Page 18 of The Process for Special Education Determination in Virginia (Clarification of Issues) (Screening, Assessment/Eligibility, IEP

Development/Implementation) (April, 1986) published by the Virginia State Department of Education provides, in relevant part, as follows:

- Under what circumstances can existing data be considered "current"?

  Generally, assessment data less than 6 months old may be considered current and thus presented to the committee(s) for review and consideration in decision making. Information older than 6 months must be updated by an appropriate professional....

  Such factors as the age of the student, the severity of the handicap, the dynamics of the home environment, etc., may necessitate the need for immediate comprehensive assessment data.

STATEMENT OF THE CASE

On December 16, 1988, Henrico officials filed their Petition for Writ of Certiorari and accompanying Appendix with the Clerk of this Court. Subsequent to delivery of the Petition to Henrico's

commercial printing service, Henrico's counsel learned of a December 5, 1988 letter from the Supervisor, Due Process Proceedings, for the Virginia State Department of Education. This letter is reproduced in the Appendix at pages I-VII.[1]

Because the letter states the Virginia State Department's contrary interpretation on two issues relied upon by the Fourth Circuit Court of Appeals, this supplemental brief respectfully directs the Court's attention to pertinent portions of the letter. In particular, the letter states the view that "we are in the position as the State

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[1] Because the Appendix to the Petition used arabic page numbers, the Appendix to this Supplemental Brief uses Roman numerals for its page numbering.

Department of Education to interpret our regulations." App. VI. Cf. Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980) (agency's interpretation "is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act.") This supplemental brief is authorized by Rule 22.6 of the Rules of the Supreme Court of the United States of America.

ADDITIONAL REASONS FOR GRANTING THE WRIT

I. The Department Which Administers Virginia's Special Education Program Continues To Interpret Virginia's Regulations Contrary To The Fourth Circuit's Decision.

A. The Virginia State Department Of Education Recently Reaffirmed That Evaluations Older Than Six Months

Must Be Updated For Educational Decision-making Despite The District Court's And Fourth Circuit's Disapproval Of That Practice By Henrico.

The district court and the Fourth Circuit reached erroneous conclusions about Henrico's EAHCA compliance in part because they misunderstood Virginia's special education requirements and overlooked the state's regulatory guidance to local school divisions.

Both courts cited Henrico's initiation of a reevaluation nine months after Jonathan's triennial reevaluation as evidence of an illegal predetermination process. See, infra. However, the Virginia State Department of Education has held that evaluations older than six months are not considered "current" for

educational decision-making and must be updated. The Process for Special Education Determination in Virginia (Clarification of Issues) (Screening, Assessment/Eligibility, IEP Development/Implementation), 18. (April 1986).

Virginia's "current" reevaluation requirement contradicts district court's reliance upon the "special reevaluation ... only nine months after the regular triennial evaluation" as proof of Henrico's alleged procedural violation. App. 55. Significantly, the same error was echoed in the Fourth Circuit's specific reference to the 1985 reevaluation as "only nine months after a regular triennial evaluation." App. 5.

Even after the Fourth Circuit's Spielberg decision, the Virginia State Department of Education's December 5,

1988 letter confirms that Henrico's 1985 reevaluation was required despite the July, 1984 triennial evaluation. In referring to reevaluations to assist review of placement recommendations, Kathe Klare, the state's Supervisor, Due Process Proceedings, wrote that "if the evaluations are eight months old, a reevaluation would be needed." App. IV-V.

Therefore, four months after the Fourth Circuit's decision, the Virginia State Department of Education, still interpreted Virginia's special education regulatory scheme to mandate the reevaluation initiated by Henrico in March, 1985. The district court's finding of fact on this issue was erroneous because it did not recognize the Virginia reevaluation requirement. The Fourth Circuit's reliance upon the

erroneous finding of fact for its conclusion renders its decision reversible as well.

B. The State Department of Education Recently Stated That Reevaluations For Consideration Of A Placement Change Do Not Constitute Predetermination Because Reevaluations Perform The Function Of "Collecting Data" For Decision-making.

The district court and Fourth Circuit were also erroneous in their evaluation of the evidence because they viewed Henrico's 1985 reevaluation process as evidencing placement predetermination. In the hindsight of the district court, Henrico requested the updated reevaluations "for the express purpose of

supporting a change in placement." App. 56. However, Ms. Klare's letter expresses the "Department's position" that "it is not predetermination when an IEP committee is considering a change in placement and consequently recommends re-evaluations to determine whether a placement change is warranted." App. V.

> This is the process of collecting data in order that the goals and objectives can be developed to determine what, if any, placement chnage is necessitated based on the required services to meet the invididual needs of the child. Id.

In short, the December 5, 1988 letter reconfirms Henrico's position that both lower courts miscomprehended Virginia special education requirements. This misunderstanding led to the district court's erroneous finding of fact upon which the Fourth Circuit incorrectly relied.

CONCLUSION

Because the Fourth Circuit and the district court misunderstood Virginia law, the Fourth Circuit's procedural compliance decision should be summarily reversed. If summary reversal is not appropriate, Henrico prays that its Petition for Writ of Certiorari be granted.

HENRICO COUNTY PUBLIC SCHOOLS
MALCOLM M. CHRISTIAN
WILLIAM C. BOSHER, JR.
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JOANN MARCHANT
GWENDOLYN WHITING
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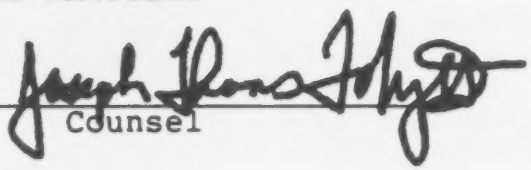
By 
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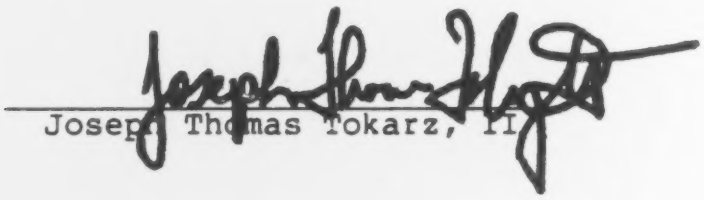
CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 1989, a true and accurate copy of the foregoing Supplemental Brief Calling Attention To Intervening Matter was mailed postage paid, first class mail, to the offices of: Thomas Franklin Guernsey, Esq., Associate Professor of Law, Youth Advocacy Clinic, University of Richmond, Richmond, Virginia 23173 and Kathleen S. Mehfoud, Esq., 411 E. Franklin Street, Suite 602, Richmond, Virginia 23219.



Joseph Thomas Tokarz, II

December 5, 1988

Dr. Jo Lynne DeMary
Director of Special Education
Henrico County Public Schools
P. O. Box 23120
Richmond, Virginia 23223

Dear Dr. DeMary:

I am in receipt of the letter you sent to both Mr. Goode and me. Please forgive the delay in responding but we at the Department wished to give the questions the proper amount of thought and attention. Therefore, the issue has been discussed with the position committee and special education personnel.

You have raised some legitimate questions about the Department's interpretation of position 88-021 which relates to the requirements for re-evaluation when a significant change in placement occurs. The position committee has been discussing this issue and although I hoped a response would be

forthcoming we are still not able to provide you with a final response. We expect a final decision in January.

We agree the position needs to be clarified for those situations where a signficant change in placement does not occur. For example, the committee has identified those situations where a child may be in a position of changing from a program where 49% of the school day is spent in the resource class to a program where 51% of his time is spent in a special education program which may now be considered a self contained program.

The Department, as you are aware, has defined a signficant change in placement in the proposed regulations based on research Dr. Judith Barnhiser completed for a response to a complaint she received. Dr. Barnhiser relied on OCR opinions and the requirements under Section 504 of the Rehabilitation Act of

1973 and then developed position 88-021 that was disseminated to the LEAs. According to this definition, a change in the level of services on the continuum of special education services, for example, resource, self-contained is defined as one of these changes where re-evaluation is required. The regulations which were adopted in 1984 require a re-evaluation every time there is a significant change in placement which was added to the regulations at the advice of the Assistant Attorney General. The word significant, however, is not defined other than by examples of changes. Since there are degreees of changes along the continuum, we agree that the position as written may be unclear as to those situations where re-evaluation may not be required and can be determined by the IEP committee without referral for more evaluations. Therefore, we will be

sending out a revised position in order to clarify the meaning and requirements for reevaluation.

In addition, you have cited the Clarification of Issues as a document which cites present positions. This document is no longer considered valid by the Department. That is one of the purposes of the position committee. A Superintendent's Memo has been sent to the LEAs on this issue.

Regarding re-evaluation, you may be aware that it does not mean that you must conduct new assessments, but rather that the LEA may choose to review the data and indicate that it is current and valid. This may be helpful in the situation where the IEP committee is considering the recommendation of a residential placement. For example, if the evaluations are eight months old, a re-evaluation would be needed. The re-

evaluation may result in conducting new components or validating some components and deciding to complete selected components only, for example, the educational assessment.

The Department's position is that it is not pre-determination when an IEP committee is considering a change in placement and consequently recommends re-evaluations to determine whether a placement change is warranted. This is the process of collecting data in order that the goals and objectives can be developed to determine what, if any, placement change is necessitated based on the required services to meet the individual needs of the child.

As you mentioned, the Department did not identify the specific decisions relied upon since we did not believe that to be necessary. As you suggest,

however, perhaps we need to add cites to our decisions.

Regarding your request for an official interpretation by U.S.D.O.E., we are in the position as the State Department of Education to interpret our regulations. These interpretations may change depending on new policy and decisions. Therefore, positions may not remain the same. We do not believe that we need to petition the U. S. Department of Education for an official ruling. As you are aware, the proposed regulations have the definition of "significant change in placement" which includes the change along the continuum of services. We will have an additional comment period for these regulations which expires on December 21, 1988. As you are aware, the Department is responsive to concerns and will seriously review the comments for any ncessary changes.

If you wish to submit additional comments which address the positions or regulations, please send them to me at the above address.

Sincerely,

[signed]

Kathe Klare
Supervisor, Due Process Proceedings
[Virginia Department of Education]

KK/pw